

The dividing line between delegated and implementing acts, part two: the Court of Justice settles the issue in Commission v. Parliament and Council (Visa reciprocity)

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CASE LAW

A. Court of Justice

The dividing line between delegated and implementing acts, part two: The Court of Justice settles the issue in *Commission v. Parliament and Council (Visa reciprocity)*

Case C-88/14, *Commission v. Parliament and Council*, Judgment of the Court (Grand Chamber) of 16 July 2015, EU:C:2015:499

1. Introduction

The present case is one of the many inter-institutional conflicts which recently came before the Court of Justice, dealing with controversies resulting from the Lisbon Treaty. That Treaty introduced the terms “delegated act” and “implementing act”, two non-legislative acts, in Articles 290 and 291 TFEU without making a clear distinction between them. It was therefore only a matter of time before the Court would be called upon to draw the dividing line.¹ *Biocides* provided the first occasion to do so,² but that opportunity was not fully seized by the Court. In *Visa reciprocity* however, the second case on the demarcation line between delegated and implementing acts, the Court seems to have settled the issue.

2. A reminder of the normative framework

In an annotation to the *Biocides* case in this *Review*, Ritleng noted that in the pre-Lisbon world no distinction between delegated and implementing acts existed and instead there was only the distinction following the *Köster* case “between legislative acts in the substantive meaning of the term, that is acts of

1. Ritleng, “La délégation du pouvoir législatif de l’union européenne”, in Cohen-Jonathan, Constantinesco, Michel, Piris and Wachsmann (Eds.), *Chemins d’Europe: Mélanges en l’honneur de Jean Paul Jacqué* (Dalloz, 2010), p. 576.

2. Case C-427/12, *Commission v. Parliament and Council*, EU:C:2014:170.

general scope directly based on the Treaty itself, and implementing acts which were based on legislative acts and intended to ensure their implementation.”³ Within these implementing acts a distinction could then be made between those acts “‘quasi-legislative’ in nature, [while] some others were regarded as more purely ‘executive’.”⁴

Thus, *Köster*⁵ made the distinction between (i) formal legislative acts and (ii) implementing acts. The former were adopted by the legislature proper and laid down (at least) the essential elements of the matter to be regulated, the latter were adopted by the Commission pursuant to Article 155 EEC (later complemented by Art. 145 EEC, under the Amsterdam numbering Arts. 211 and 202 EC). Implementation was then understood in a broad sense and encompassed both normative acts (substantive legislative acts) and executive measures. As long as they did not alter the essential elements of the formal legislative act, and the Court took a broad view of what non-essential meant,⁶ the Commission had the competence to adopt them.

Of course, this meant that the pre-Lisbon notion of “implementation” was a bit too broad. When the Commission altered a legislative act it could not properly be said to be *implementing* that act. The function of altering a legislative act is fundamentally different from implementing that act and in the EU legal order both activities also have different repercussions for the vertical and horizontal distribution of powers. As a rule, the implementation of EU law is left to the Member States’ administrations, pursuant to Article 291(1) TFEU, while legislative acts are, evidently, adopted by the EU legislature. As a result, when the Commission exercises an implementing (in the strict sense) power, the EU’s vertical distribution of powers is affected. When the Commission alters formal legislative acts, the horizontal distribution of powers is affected. The Lisbon Treaty reflected this by making a distinction, in the broad notion of implementation, between executive acts that amend or supplement formal legislative acts, i.e. the delegated acts under Article 290 TFEU, and executive acts that (merely) implement generally binding EU acts, i.e. the implementing acts under Article 291 TFEU.

The distinction also led to the rationalization of the supervision regime which had hitherto been in force: post-Lisbon, comitology only applies when implementation in the strict sense is at issue but not when delegated acts are

3. Ritleng, “The dividing line between delegated and implementing acts: The Court of Justice sidesteps the difficulty in *Commission v. Parliament and Council (Biocides)*”, 52 CML Rev. (2015), 243–257.

4. Ibid.

5. Case 25/70, *Köster*, EU:C:1970:115.

6. See Case 23/75, *Rey Soda v. Cassa Conguaglio Zuccherio*, EU:C:1975:142, para 14; Case C-240/90, *Germany v. Commission*, EU:C:1992:408, para 37.

adopted. The Treaty thus clarified that if the Commission exercises an implementation competence, control should be exercised by the actors normally responsible for implementation, i.e. the Member States (through comitology). Similarly, when the Commission amends or supplements a formal legislative act, control should be exercised by the formal legislature (under the ordinary legislative procedure, the Council and Parliament).

3. Legal and factual background to the case

The present dispute concerned Regulation 1289/2013 of Parliament and Council⁷ revising the reciprocity mechanism in Regulation 539/2001 on visa requirements for third country nationals.⁸ The revision was necessary, *inter alia* to bring the Regulation in line with the Lisbon Treaty.⁹ The original Regulation lists the third countries whose nationals require a visa when entering the Schengen area in its Annex I, while the third countries whose nationals are exempted from a visa requirement are listed in Annex II. Should an Annex II country impose a visa obligation on the nationals of one (or several) Member States, the reciprocity mechanism kicks in. Under the contested Regulation 1289/2013, the mechanism comprises three main successive stages, and a preliminary stage.¹⁰ In the preliminary stage, the Member State concerned notifies the EU institutions, and the information provided is published by the Commission in the Official Journal.¹¹ If bilateral

7. Regulation (EU) 1289/2013 of the European Parliament and of the Council of 11 Dec. 2013 amending Council Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. 2013, L 347/74.

8. Council Regulation (EC) 539/2001 of 15 Mar. 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, O.J. 2001, L 81/1.

9. Under Art. 67 EC the Council was the sole legislative body (the Parliament only being consulted), while under Art. 77(2) TFEU the ordinary legislative procedure applies. In addition, under the original Regulation, the suspension decision was made pursuant to a secondary legal basis, a practice repudiated by the Court in the *Minimum common lists* case. See Case C-133/06, *Parliament v. Council*, EU:C:2008:257. For a discussion of this case, see Craig, 46 CML Rev. (2009), 1265–1275. For this reason, the Commission originally proposed a (much simpler) reciprocity mechanism whereby decisions on suspensions would be adopted pursuant to the ordinary legislative procedure. See COM(2011) 290 final.

10. The procedure could also be said to encompass four stages (including the preliminary stage), but to enhance the readability of this note, reference is made to the three stages as identified by A.G. Mengozzi and the Court. See Opinion of A.G. Mengozzi in Case C-88/14, *Commission v. Parliament & Council*, EU:C:2015:304, para 9 et seq.

11. See Art. 1 (4)a of Regulation 539/2001 as amended by Regulation 1289/2013.

contacts with the third country concerned do not result in the lifting of the visa requirement, within a period of 90 days following the publication in the Official Journal, the Member State concerned may ask the Commission to suspend the EU exemption for the third country.¹² The Commission is not obliged to do so, since it should *inter alia* take into account possible repercussions on the EU's and the Member States' relations with that third country.¹³

In the first stage, at the latest six months following the publication in the Official Journal, and further at six months intervals as long as the third country has not lifted the visa requirement,¹⁴ the Commission may adopt an implementing act. That act, adopted following the examination procedure, suspends the exemption for the nationals of the third country concerned for a period of six months.¹⁵ In the alternative the Commission adopts a report indicating the reasons why it decides not to suspend the exemption.¹⁶

In the second stage, and if after 24 months following the publication in the Official Journal, the third country has still not lifted the visa requirement, "the Commission shall adopt a delegated act . . . temporarily suspending the application of Annex II for a period of 12 months for the nationals of that third country."¹⁷ To this end Annex II is amended, unlike in the first stage, through the addition of a footnote next to the third country concerned. In the third stage, if the third country has still not lifted the visa requirement after six months of the entry into force of that delegated act, the Commission may submit a legislative proposal for the amendment of the basic regulation.

In the present case, the Commission requested the (partial) annulment of Regulation 1289/2013 insofar as it violated Articles 290 and 291 TFEU, since it provided recourse to a delegated act in the second stage of the procedure. The Commission was of the opinion that such a suspension of the visa exemption should be effected through an implementing act, just like in the first stage.

In this complex area of law, the Commission's single plea was deceptively simple: the choice for a delegated act in the second stage of the procedure was wrong, since delegated acts can only be used, following Article 290 TFEU to amend or supplement a legislative act, while *in casu* the legislative act would be implemented, requiring recourse to the implementing act foreseen in Article 291 TFEU. Behind this plea the many controversies related to the new

12. See Art. 1 (4)c of Regulation 539/2001 as amended by Regulation 1289/2013.

13. See Art. 1 (4)d of Regulation 539/2001 as amended by Regulation 1289/2013.

14. See Art. 1 (4)e of Regulation 539/2001 as amended by Regulation 1289/2013.

15. See Art. 1 (4)e (i) of Regulation 539/2001 as amended by Regulation 1289/2013.

16. See Art. 1 (4)e (ii) of Regulation 539/2001 as amended by Regulation 1289/2013.

17. See Art. 1 (4)f of Regulation 539/2001 as amended by Regulation 1289/2013.

system under Lisbon lay hidden. In the course of the proceedings in the present case, the Court handed down its ruling in *Biocides*. It has rightly been noted that while *Biocides* was a first clarification of the central issue, the Court would have to elucidate the differences between the two acts in further cases.¹⁸ As a result, a large part of the exchanges between the parties in the present case dealt with the question of how the ruling in *Biocides* should be interpreted. While *Biocides* will not be discussed as such in this annotation,¹⁹ the basic elements of that case will be taken up in the discussion of the Advocate General's Opinion.

4. Opinion of the Advocate General

4.1. Revisiting the *Biocides* case

Advocate General Mengozzi commented elaborately on the Court's ruling in *Biocides*, if only because the parties proposed different readings of that ruling in their submissions. In *Biocides*, the Court had confirmed that "the EU legislature has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU."²⁰ While this could be understood as confirming the Council's suggestion that a grey area between the two types of acts exists,²¹ Advocate General Mengozzi emphasized that the Court in *Biocides* had not explicitly ruled on whether Articles 290 and 291 TFEU are mutually exclusive.²²

The Advocate General (like Ritleng in a previous issue of this *Review*), noted the tension in *Biocides* between the legislature's discretion in choosing between the delegated or implementing act and the Court's subsequent extensive review, spanning 11 paragraphs, of that choice.²³ According to the Advocate General, *Biocides* confirmed that the legislature has discretion in choosing between the two acts, but following that choice it has to work out the

18. Michel, "Du départ entre acte délégué et acte d'exécution", 24 *Europe* (2014), No. 5, 18.

19. For a discussion of the *Biocides* case, see Ritleng, op. cit. *supra* note 3; Chamon, "Clarifying the divide between delegated and implementing acts?", 42 *LIEI* (2015), 175–189; Michel, op. cit. *supra* note 18; Buchanan, "The conferral of power to the Commission put to the test", 5 *European Journal of Risk Regulation* (2014), 267–272.

20. See Opinion of A.G. Mengozzi, para 40.

21. Buchanan also notes that in *Biocides* the Court declined to rule on whether Arts. 290 and 291 TFEU are mutually exclusive and instead firmly stated that the EU legislature has discretion in its choice. See Buchanan, op. cit. *supra* note 19, at 271.

22. See Opinion of A.G. Mengozzi, para 35.

23. Ibid., para 37; Ritleng, op. cit. *supra* note 3, at 254.

content and the structure of the basic act so as to conform to the exigencies of either Article 290 or 291 TFEU. Although these articles do not refer to the degree of discretion left to the Commission, Advocate General Mengozzi further found that the Court in *Biocides* effectively took account thereof in its assessment of the legislature's choice. Like several commentators,²⁴ the Advocate General noted that the Court had actually not expressly referred to "the discretion conferred on the Commission as a factor by reference to which it is possible to distinguish between delegated acts and implementing acts";²⁵ but since the Court found that the system established by the legislature was sufficiently detailed and defined, this amounted, according to the Advocate General, to a finding that no significant discretionary power was entrusted to the Commission.

"[T]he breadth of discretion, greater or lesser, that is conferred on the Commission"²⁶ was then used by the Advocate General as a criterion to draw the dividing line between the delegated and implementing act. However, regardless of the issue of discretion, the measures which the Commission would adopt *in casu* would also *formally* amend the basic legislative act, begging the question whether in such a case the issue of discretion is at all relevant. I.e. if a formal amendment of a legislative act is at issue, should the choice not automatically fall on the delegated act?

Parliament and Council had defended this position²⁷ while the Commission suggested that amendments that do not call for the exercise of any discretion and which do not alter the normative content of a legislative act should be effected through implementing acts. The answer to the question depends on how Article 290 TFEU should be interpreted – textually, contextually, genetically and teleologically. The Advocate General indeed noted that a formalistic approach (advanced by Parliament and Council) would have the benefit of clarity²⁸ and that the wording of Article 290 TFEU does not seem to permit any other interpretation, meaning that a legislative act is *amended* whenever any of its elements are changed through deletion, addition or replacement.²⁹

While the Advocate General thus favoured the formalistic approach, he was not unsympathetic to the Commission's substantive approach either. For this,

24. See Chamon, op. cit. *supra* note 19, at 188; Ritleng, op. cit. *supra* note 3, at 252.

25. Opinion of A.G. Mengozzi, para 26.

26. Ibid., para 25.

27. According to the Council, the question of discretion is never relevant to draw the dividing line; according to Parliament it is only relevant when it is not a formal amendment which is at issue (which *in casu* it was), see Opinion of A.G. Mengozzi, para 23.

28. It may further be noted that one of the aims of the Lisbon Treaty was to simplify EU decision-making.

29. Opinion of A.G. Mengozzi, paras. 41 and 47.

the Advocate General went back to the issue of discretion, finding that where the Commission exercises discretion it is only normal for the legislature to review the Commission's decisions through the mechanisms provided in Article 290 TFEU. In such a case the legislature should be able to intervene if the Commission unduly interferes with a legislative act. On the other hand, if the Commission does not exercise (meaningful) discretion, there is no real reason why the legislature ought to review the Commission's decisions, making recourse to the delegated act unjustified.³⁰

The Advocate General further scrutinized this in the light of the principle of institutional balance. Although he only touched upon this issue briefly, this element of the Opinion is of great interest, since the Court of Justice hardly ever enforces the *principle* of institutional balance in its case law.³¹ Here, the Advocate General suggested that the institutional balance could be relied upon to make sense of the unclear delimitation between Articles 290 and 291 TFEU: the broad interpretation of "amending" legislation following a formalistic approach (resulting from a plain textual interpretation of Art. 290 TFEU) could upset the institutional balance if the legislature were to arrogate to itself the review powers of Article 290 TFEU in a matter which, substantively, is merely executive in nature and thus falling under Article 291 TFEU (which does not allow any scrutiny by the legislature).³² In such a case, the institutional balance would require that a textual interpretation of Article 290 TFEU is dismissed. To further illustrate that not just any amendment of a legislative act should be effected through a delegated act, the Advocate General suggested the possibility of amending an annex to a legislative act where that annex does not contain measures of general application. In such a case, while a legislative act would be formally amended (hence requiring recourse to the delegated act under Art. 290 TFEU), another

30. Ibid., para 45.

31. The Court rarely uses the institutional balance as a self-standing *principle* and instead uses it as a short-hand to refer to the rules governing the inter-institutional relations. See Chamon, "The institutional balance, an ill-fated principle of EU Law?", 21 EPL (2015), 390–391. For another recent case, see Case C-409/13, *Council v. Commission (Macro-financial assistance to third countries)*, EU:C:2015:217, para 95, annotated in Chamon, "Upholding the 'Community method': Limits to the Commission's power to withdraw legislative proposals – Case C-409/13", 40 EL Rev. (2015). For further illustrations, see Case C-77/11, *Council v. Parliament*, EU:C:2013:559; Case C-73/14, *Council v. Commission*, EU:C:2015:663, para 61. That the Court simply applies (general or specific) provisions of the Treaties under the banner of the institutional balance may also (implicitly) be read into the analysis of Jacqu , who notes that "the Court of Justice takes the institutional balance into account under a static aspect – that is to say, as it results from the treaties ..." and who only refers to the *Chernobyl* case as an illustration of the institutional balance being used in a "dynamic" way (i.e. as a *principle*). See Jacqu , "The principle of institutional balance", 41 CML Rev. (2004), at 386 and 387.

32. See however Art. 11 of the Comitology Regulation 182/2011, O.J. 2011, L 55/13.

precondition for recourse to Article 290 TFEU would not be fulfilled, since that Article also explicitly provides that delegated acts are acts of general application.³³

The Advocate General concluded by finding that, following a literal interpretation of Article 290 TFEU, an amendment to a legislative act should be done through a delegated act. Only “in cases in which it is quite clear that the amendment requiring to be made leaves the Commission no leeway and will not affect the legislative elements of the basic act”³⁴ could an amendment be effectuated without recourse to a delegated act. To illustrate, the Advocate General gave the example of the amendment of an annex by the Commission on the basis of information provided by a Member State and where the Commission is under an obligation to “automatically” amend the annex accordingly.³⁵

4.2 *Applying the Advocate General’s test in casu*

The remainder of the Advocate General’s Opinion was dedicated to applying his general conclusions to the case at hand.

On the nature of decisions to suspend certain rules in a legislative act, the Advocate General sided with the Commission, finding that such decisions generally belong to the executive function.³⁶ This lends support to the Commission’s argument that the suspension in the second stage should be given effect through an implementing act, just like the suspension in the first stage.

However, the Advocate General noted that the suspension in the second stage also resulted in a formal amendment of the legislative act because of the addition of a footnote in Annex II.³⁷ This raised the question whether recourse to Article 290 TFEU was not automatically required. While the Advocate General agreed that the addition of a footnote was not necessary to suspend a visa waiver,³⁸ he sided with the argument of the Parliament that the insertion of the footnote and the suspension cannot be dissociated from each other.³⁹

33. Whether this means an implementing act should be used to effect such an amendment is not clear however. This would only be the case if Arts. 290 and 291 TFEU form a closed system, but in case C-270/12, *Short-selling*, EU:C:2014:18, the Court confirmed that this is not the case. See further *infra*.

34. Opinion of A.G. Mengozzi, para 49.

35. *Ibid.*

36. *Ibid.*, para 58.

37. *Ibid.*, para 59.

38. *Ibid.*, para 62.

39. *Ibid.*, para 63.

As to why this is the case, the Advocate General remained rather unclear and seemingly deferred to the legislature's intention to incorporate the suspension in the annex of the legislative act.⁴⁰ For the Advocate General this meant that the amendment did affect the legislative elements of the basic act,⁴¹ and he further found that despite the automatic elements in the reciprocity mechanism, there is still some discretion left to the Commission in the second stage, meaning also the second condition of his test remained unfulfilled.⁴²

Still, if the legislature's intention determines the choice between a delegated act and an implementing act, what kind of judicial review can the Court exercise to scrutinize that choice? To answer this question the Advocate General went back to his reading of *Biocides* and noted that while the legislature has a broad discretion, it needs to make sure that the legislative act's content and structure is worked out in accordance with the Treaty framework. It would thus fall to the Court to check whether the legislature had indeed done so and whether the resulting content and structure is not arbitrary, irrational or inconsistent.⁴³ The Commission's arguments thereon failed to convince the Advocate General. As to the sense in leaving the Commission a greater discretion when adopting an implementing act (in the first stage) than when adopting a delegated act,⁴⁴ the Advocate General did not find this problematic⁴⁵ and instead was more convinced by the argument that the different stages follow the logic of an increasing intensity which goes together with different acts at different levels of the hierarchy of norms.⁴⁶

The Commission had also argued that the possibility to revoke the delegation, a scrutiny mechanism only foreseen in Article 290 TFEU, was nonsensical since if the revocation were exercised, the whole logic of the three successive stages would collapse.⁴⁷ The Advocate General noted that since the revocation is foreseen in Article 290 TFEU itself, it is not abnormal for that mechanism to be included in the contested regulation. In addition, the Advocate General noted that the procedure can still continue to the third stage, even when the second stage is "amputated".⁴⁸

As a result, the Advocate General proposed to the Court to dismiss the case.

40. Ibid., para 64.

41. Ibid., para 65.

42. Ibid., para 66.

43. Ibid., para 73.

44. Ibid., para 74.

45. Ibid., para 75.

46. Ibid., para 76.

47. Ibid., para 77.

48. Ibid.

5. The Court's ruling

In its judgment, the Court was very short and remarkably clear, concisely setting out the basic principles governing this area of law post-Lisbon. Fortunately it also continually referred back to its ruling in *Biocides*, clarifying the latter by applying the general rules to be inferred from that ruling to the present case.

Referring to *Biocides*, the Court first confirmed that the legislature indeed has a discretion in its choice on whether to empower the Commission under Article 290 or 291 TFEU, albeit that this discretion should evidently be exercised in full respect of the framework laid down in those two articles.⁴⁹ The Court thereby seems to have decided the discussion following *Biocides* on the genuinely discretionary nature of the legislature's power in this respect. The Court further repeated its observations in *Biocides* that a delegated act serves "to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act",⁵⁰ while an implementing act serves to "provide further detail in relation to the content of [the basic act]."⁵¹ Crucially, it explicitly rejected the Commission's argument (and the possibility left by the Advocate General) that the discretion left to the Commission (by the legislature) could be a relevant element in deciding whether the Commission should be granted a delegated or an implementing power.⁵²

The Court then recalled the common ground between the parties in the proceedings: the Commission had accepted that pursuant to the contested provision, it would adopt acts of general application relating to the non-essential elements of the basic act, while Parliament and Council did not refute that the Commission would not be supplementing the basic act. According to the Court the question then was whether the Commission would be amending the basic act.

Scrutinizing the contested provision *in casu*, the Court repeated the observation by the Advocate General to the effect that "[t]he mechanism for implementing the principle of reciprocity is thus characterized by measures of increasing gravity and political sensitivity, to which instruments of different kinds correspond",⁵³ allowing it to refute the Commission's argument that

49. Case C-88/14, *Commission v. Parliament and Council*, EU:C:2015:499, para 28.

50. *Ibid.*, para 29.

51. *Ibid.*, para 30.

52. *Ibid.*, para 32.

53. *Ibid.*, para 39.

under the second stage just like under the first stage, an implementing act ought to be adopted.⁵⁴

Coming to the question whether the contested provision would allow the Commission to amend the basic act, the Court remarked that the basic legislative act provides in visa-free travel for certain third country nationals and that an act adopted pursuant to the contested provision re-introducing a visa requirement would “thus [have] the effect of amending, if only temporarily, the normative content of the legislative act in question.”⁵⁵ As to the controversy on the effect of the requirement to add a footnote to Annex II, the Court observed that that requirement “demonstrates . . . the intention of the EU legislature to insert the act adopted on the basis of that provision in the actual body of [the basic legislative act].”⁵⁶

Finding that the contested provision would indeed allow an amendment of the basic legislative act, the Court rejected the Commission’s argument on the practical difficulties resulting from the legislature’s choice for a delegated, rather than an implementing, power,⁵⁷ concluding that the Commission’s action should be dismissed.

6. Comment

The Court’s ruling should be welcomed for its clarity even if it will not be welcomed by every commentator for its substance.

6.1. *The Treaty exhaustively lists the relevant conditions and criteria*

After all, the Court has effectively confirmed that the criteria and conditions explicitly provided in Articles 290 and 291 TFEU are at the same time also the only applicable criteria and conditions. As long as the legislature respects these, it is completely free in its choice between empowering the Commission either under Article 290 or 291 TFEU. So far, this is in line with Advocate General Mengozzi’s reasoning, but at the same time the Court further solved the debate on the existence of a grey area between the two types of acts, by rendering the debate obsolete. While the present case again confirms the conclusion, which could already be drawn from *Biocides*, that a grey area

54. Ibid., para 40.

55. Ibid., para 42.

56. Ibid., para 43.

57. Ibid., para 45.

exists,⁵⁸ the Court confirmed that it will not venture in this grey area itself, since in this domain the legislature is the absolute sovereign.

That a grey area exists follows from there being situations in which the criteria and conditions of both Articles 290 and 291 TFEU may be fulfilled.⁵⁹ In *Biocides*, the Commission had invited the Court to rule that this is actually not possible since Articles 290 and 291 TFEU constitute mutually exclusive realms, requiring the Court to introduce further conditions and criteria (such as e.g. the discretion left to the Commission to adopt further acts). The Court in *Biocides* declined to do so and it has now ruled to the effect that no further criteria and conditions exist. In light of the functions of both the delegated act and the implementing act as identified by the Court,⁶⁰ a pertinent question here is whether the Court would still not step in if, even though respecting the criteria and conditions laid down in Articles 290 and 291 TFEU, the Commission is empowered to “provide further detail in relation to the content of a basic act” through a delegated instead of an implementing act or to “adopt rules coming within the framework of the basic act” through an implementing instead of a delegated act. However, since they are worded generally and in an overlapping way,⁶¹ even the basic functions of both acts would seem to be unworkable criteria to distinguish delegated from implementing acts.

6.2. *The Court confirms the legislature’s dominance*

In *Visa reciprocity*, the Court – unlike in *Biocides* – does not really seem to link the two types of acts any more. In *Biocides*, the Court remarked that “the concept of an implementing act within the meaning of Article 291 TFEU must be assessed in relation to the concept of a delegated act, as derived from

58. See Chamon, *op. cit. supra* note 19, at 187.

59. As Craig notes, any secondary measure will always “add” something to the basic act. While Art. 290 TFEU provides that the delegated act ought to be used when a basic act is “supplemented”, an implementing act under Art. 291 TFEU should also “add” something to the basic act, otherwise it would serve no purpose. “The key issue is therefore whether what is added will be regarded as ‘supplementing’ the legislative act.” See Craig, “Delegated acts, implementing acts and the new Comitology Regulation”, 36 *EL Rev.* (2011), at 673. To clarify this problem further one could think of the following illustration: under the direct support scheme of the Common Agricultural Policy, a farmer is only eligible for direct support if his activities are not insignificant (See Regulation 1307/2013). If the legislature had wanted to empower the Commission to make this requirement more concrete it could have done so through either Art. 290 or 291 TFEU, each time respecting the conditions and criteria listed in those Articles. Clarifying the requirement of “insignificant activities” could be qualified as a supplementation of the basic act, but it could also be qualified as an implementation, ensuring that this requirement is applied uniformly to all farmers in the EU.

60. Case C-88/14, *Commission v. Parliament and Council*, paras. 29–30.

61. Ritleng, *op. cit. supra* note 3, at 251.

Article 290 TFEU”⁶² but this idea is absent from the present case. In a sense, this omission should be welcomed, since the idea that “the implementing act cannot be understood without reference to the delegated act” creates the impression that they form a closed system in which both acts are indeed mutually exclusive. However, as noted, the Court actually rejected such mutual exclusivity in *Biocides*. Furthermore, the Court had ruled earlier, in *Short-selling*, that Articles 290 and 291 TFEU do not form a closed system, but may instead be elaborated by the legislature to the effect that other “executive” acts may be created in secondary legislation and that other “executive” bodies, different from the Commission and Council, may subsequently be empowered to adopt such acts.⁶³

These cases taken together result in a remarkably strong position of the legislature. The Court essentially confirms that the legislature is free to decide whether (i) the Commission (either under Art. 290 or 291 TFEU), (ii) the Council (under Art. 291 TFEU) or (iii) other executive bodies such as the decentralized agencies will adopt further measures. The legislature should only make sure that the conditions and criteria under Article 290 (Commission) or 291 TFEU (Commission or Council) are met when empowering the Commission or Council. Given the lack of an enabling clause in primary law to empower the decentralized agencies, there are no immediate conditions and criteria which need to be met when the legislature decides to empower an agency.⁶⁴ Lenaerts justifies the legislature’s discretion to empower executive bodies other than the Commission and Council by referring to the legislature’s discretion confirmed in *Biocides*,⁶⁵ but it should be noted that *Biocides* (and now *Visa reciprocity*) confirm a discretion in choosing between two *Treaty-provided* scenarios, while the empowerment of EU agencies is *unforeseen* in primary law. It then seems doubtful that the legislature ought to have the same discretion in both scenarios.

Focusing on the choice between empowering the Commission under Article 290 or 291 TFEU, the question *in casu* depended on whether the contested provision allowed an actual amendment of the basic legislative act. For the Court, unlike the Advocate General, the controversy was solved once this issue was determined.

62. Case C-427/12, *Commission v. Parliament and Council*, para 35.

63. Case C-270/12, *UK v. Parliament and Council (short-selling)*.

64. However, some conditions could be deduced from *Short-selling*. After all, pursuant to the contested provision in that case, the European Securities and Markets Authority could only adopt (i) temporary measures, (ii) in exceptional circumstances (iii) in an area requiring very technical expertise.

65. Lenaerts, “EMU and the EU’s constitutional framework”, 39 *EL Rev.* (2014), 762–763.

6.3. *A broad understanding of the concept of “amendment”?*

On the issue of the possible amendment of the basic legislative act, the Court’s judgment still leaves some ambiguity. In its arguments, the Commission had suggested that the requirement that a footnote be added to Annex II was a formalistic technique which merely served to ensure that the basic act was formally amended, justifying recourse to a delegated act. On this, the Court noted that the requirement of adding a footnote reflected “the intention of the EU legislature to insert the [delegated] act . . . in the actual body of [the basic legislative act].”⁶⁶ This observation by the Court again shows how the legislature’s intention rather than some objective criterion (other than those laid down in Arts. 290 and 291 TFEU) is decisive in determining pursuant to which Treaty article the Commission may be empowered.

The ambiguity referred to results from the Court’s further observation that an amendment is at issue since the rules normally applicable (as laid down in the basic legislative act) would be changed and would be laid down in a delegated act. Here the Court did not rely on the formal amendment of the basic legislative act, but instead stressed that the applicable rules (contained in the basic legislative act) would be materially amended since the delegated act sets out new rules henceforth governing the legal position of the third country nationals concerned. This would suggest that recourse to a delegated act is possible, even if there is no formal amendment of a legislative act. Instead, and similar to the supplementation of a legislative act through a delegated act, if the provisions contained in a legislative act are *de facto* amended this could be done by delegated act. This would obviate the need for the legislature to rely on formalistic arrangements such as the addition of a footnote in a basic legislative act to make sure that the adoption of new provisions could qualify as an amendment.

6.4. *Should Visa reciprocity be welcomed?*

In his comment on *Biocides* in this *Review*, Ritleng noted that that ruling will have disappointed commentators both in respect of the criterion used (by the Court) to demarcate Articles 290 and 291 TFEU (on which the constitutional significance of the changes by the Lisbon Treaty depended) and in respect of the Court’s scrutiny of the legislature’s application of the criterion.⁶⁷ As already hinted at, the Court’s ruling in the present case will not be welcomed by those commentators either, since the Court’s criterion boils down to the legislature’s intent and the Court limits its scrutiny to verifying whether the

66. Case C-88/14, *Commission v. Parliament and Council*, para 43.

67. Ritleng, *op. cit. supra* note 3, at 250–251.

basic requirements explicitly set out in Article 290 TFEU (or Art. 291, as the case may be) are respected. While the Court's rulings could be criticized for this, it should be noted that its post-Lisbon case law is basically a confirmation of its earlier (pre-Lisbon) case law on comitology.⁶⁸ On this case law, Bergström noted: "the role of the Court . . . has been far from active: not only has it proved itself unwilling to reduce the room for political negotiations but it has also demonstrated a surprising ability to adapt itself to their result."⁶⁹ While the Court's approach could thus be deplored, it cannot be qualified as a break with its previous case law.⁷⁰

Still, *Biocides* and *Visa reciprocity* may be deplored because they largely leave the changes introduced by the Lisbon Treaty, which ought to be of constitutional importance as noted by Ritleng, in the hands of the ordinary legislature. In addition, there could be some concern about the fact that the Court's rulings leave the Commission in a rather weak position versus the legislature.⁷¹ Here, however, it should be noted that the legislature (only) has a broad discretion in choosing between two ways to empower the Commission, the latter being the authority on which powers are conferred in

68. It should be noted that the Court's non-interventionist approach does not simply benefit the legislature, but may also favour the Commission. For a post-Lisbon illustration, see the Court's rejection of the Parliament's complaint that the Commission had not respected Regulation 492/2011 when implementing (pursuant to Art. 291(2) TFEU) its provisions in Case C-65/13, *Parliament v. Commission*, EU:C:2014:2289. In a currently pending case, Parliament reproaches the Commission of not respecting Art. 290 TFEU by adopting a delegated act modifying (rather than merely supplementing) the basic legislative act. See Case C-286/14, *Parliament v. Commission*, O.J. 2014, C 253/21.

69. Bergström, *Comitology: Delegation of Powers in the European Union and the Committee System* (OUP, 2006), p. 319.

70. By way of illustration, Spain's challenge to the Unitary Patent Package may be referred to here as well. Spain had challenged the legality of Regulation 1257/2012 *inter alia* on the ground that by entrusting the setting of the renewal fees to an EU Member State committee of the European Patent Organization (EPO), the Regulation violated Art. 291(2) TFEU since the Commission ought to have been empowered. The Court dubiously dismissed the plea (i) by noting that the renewal fees for European Patents with Unitary Protection do not necessarily have to be uniform for all Member States and (ii) by finding that the contested Regulation was a special agreement in the sense of Art. 149 of the European Patent Convention and that the setting of fees therefore falls to the bodies of the EPO. As regards the renewal fees, they have in the meantime (logically?) been set uniformly at the "true Top 4 level". As regards the second argument, it is remarkable, and contrary to the idea of an autonomous EU legal order, that the Court relies on a provision of international law to disapply a provision of EU primary law. See Case C-146/13, *Spain v. Parliament and Council*, EU:C:2015:298, paras. 77–83.

71. Although some commentators were initially worried that the possible lack of further criteria to be developed by the Court would leave the Commission in too strong a position, see Sydow, "Europäische exekutive Rechtsetzung zwischen Kommission, Komitologieausschüssen, Parlament und Rat", 67 JZ (2012), at 160 and 163.

any case.⁷² The Court might be stricter if it has to test whether the legislature rightly conferred implementing powers on the Council (under Art. 291 TFEU) rather than on the Commission. While pre-Lisbon the Court's review of this choice was also lenient,⁷³ the new set-up under Lisbon might persuade the Court to verify more strictly whether the Council has been conferred implementing powers in *duly justified* specific cases.⁷⁴ Lastly, the Court also recently confirmed, in the *MFA* case,⁷⁵ that the Commission retains the right to withdraw its legislative proposal in those cases in which the legislature plans to adopt amendments in such a way that the original objective of the proposal is frustrated. While it may be doubted that an amendment (by Council and/or Parliament) changing a proposed delegated power to an implementing power (or vice-versa), could be so fundamental that it frustrates the purpose of the Commission's proposal, such a scenario could still be tested.

7. Conclusion

In the present case, the Court seems to have definitively solved the issue of the delimitation between Articles 290 and 291 TFEU. *Visa reciprocity* confirms and clarifies *Biocides* in that there is a grey area between the two Articles but since there are no further criteria (other than those explicitly provided in Arts. 290 and 291 TFEU), the legislature enjoys full discretion in choosing between the two types of acts as long as it respects the framework set by the Treaty articles. While the Advocate General's nuanced analysis, as is often the case,

72. In this regard Buchanan notes that "it is not clear whether the Commission has more power under Art. 290 or 291(2) TFEU." See Buchanan, *op. cit. supra* note 19, at 272. Indeed, while the Commission is not subject to the scrutiny of committees when adopting delegated acts and while the Commission can exercise a legislative function through delegated acts, implementing acts also allow it to exercise a normative function (albeit more restricted). In addition, the Commission also controls the comitology procedures to a degree, since it presides the committees.

73. In *Visa policy*, the Court noted that the Council's justifications for reserving implementing powers to itself were "both general and laconic", but it still dismissed the Commission's case. See Case C-257/01, *Commission v. Council*, EU:C:2005:25, para 53.

74. Under the Nice Treaty the Council could exercise implementing powers simply *in specific cases*. However, under Nice, it was also the Council which reserved implementing powers to itself under Art. 202 EC. Under Art. 291(2) TFEU, it is the legislature that has a choice between empowering the Commission (default situation) and empowering the Council (in duly justified specific cases or for CFSP matters). This could also affect the Court's assessment of such a choice, since the Council does not "reserve" powers to itself any more. The decision of an institution reserving powers to itself should arguably be scrutinized more closely than a conferral of implementing powers by the legislature (even if it is the Council acting as (co-)legislator and the conferral *de facto* resembles a reservation of powers).

75. See Case C-409/13, *Council v. Commission (Macro-financial assistance to third countries)*. For a discussion, see Chamon, *op. cit. supra* note 19, EL Rev.

was more interesting from a legal perspective, the Court's straightforward approach appears preferable, preventing endless litigation on the issue and instead leaving it to the political arena.

Still, the Court's solution begs the question what remains of the constitutional significance of the changes introduced by the Lisbon Treaty to the EU's comitology system. One could argue that the freedom left to the legislature is at odds with the constitutional repercussions which a choice between empowering the Commission to adopt either delegated or implementing acts *ought* to have. One could also deplore the weak position in which the Commission is left, in its political struggle with the legislature. However, from that perspective, the Court's sanctioning of significant empowerments to EU agencies in *Short-selling* seems a greater threat than the Court's sanctioning of the legislature's discretion in its choice to empower the Commission under either Article 290 or 291 TFEU.

In all, the take home message of *Visa reciprocity* is that the Court has clarified that it will not elaborate the framework of Articles 290 and 291 TFEU with further criteria or requirements. The decision on empowering the Commission is thereby left to the political process (of course within the confines of the primary law framework) with the final word for the (co-)legislator(s).

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